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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-194

REPUBLIC STEEL CORPORATION ----- APPELLANT

VS:

DAVID BINGHAM, WORKMEN'S
COMPENSATION BOARD OF KENTUCKY,
and SPECIAL FUND ----- APPELLEES

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE E. N. VENTERS, JUDGE

BRIEF FOR APPELLEE, SPECIAL FUND

FILED

MAY 3 1976

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This is to certify that pursuant to R.C.A. 1.250 a true copy of this brief has been served by mail on the Honorable John D. Hays, Ward Building, Pikeville, Kentucky 41501; Honorable Harry R. Stamper, Box 69, Pikeville, Kentucky 41501; Honorable William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and Honorable E. N. Venters, Judge of Pike Circuit Court, Pikeville, Kentucky 41501, this the 3rd day of May, 1976.

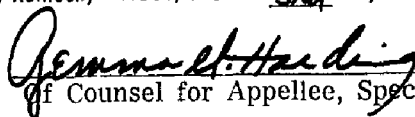

of Counsel for Appellee, Special Fund

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**STATEMENT OF
QUESTION PRESENTED**

1. HAS APPELLEE, DAVID BINGHAM, WHO ALLEGEDLY SUSTAINED A WORK RELATED INJURY ON FEBRUARY 4, 1974 MET HIS BURDEN OF ESTABLISHING EVIDENCE OF SUCH WORK RELATED INJURY SUFFICIENTLY STRONG TO COMPEL A FINDING FOR THE EMPLOYEE OR SO PERSUASIVE THAT IT WOULD BE CLEARLY UNREASONABLE FOR THE BOARD NOT BE PERSUADED BY IT?

2. DID THE PIKE CIRCUIT COURT COMMIT AN ERROR OF LAW IN REVERSING THE WORKMEN'S COMPENSATION BOARD WHEN THE BOARD'S FINDINGS OF FACT AND JUDGMENT WERE FULLY SUSTAINED BY THE EVIDENCE OF RECORD AND THE RULING CASE LAW IN KENTUCKY?

JAMES R. YOCOM (SPECIAL FUND) ANSWERS NO TO THE FIRST QUESTION AND YES TO THE SECOND QUESTION.

SUPREME COURT OF KENTUCKY

FILE NO. 76-194

REPUBLIC STEEL CORPORATION ----- APPELLANT

VS:

**DAVID BINGHAM, WORKMEN'S
COMPENSATION BOARD OF KENTUCKY,
and SPECIAL FUND ----- APPELLEES**

**APPEAL FROM PIKE CIRCUIT COURT
HONORABLE E. N. VENTERS, JUDGE**

BRIEF FOR APPELLEE, SPECIAL FUND

MAY IT PLEASE THE COURT:

STATEMENT OF CASE

The Special Fund adopts in toto the very excellent statement of the case as presented by the appellant Republic Steel Corporation in its appellant's brief and will not burden the Court with a new re-statement of the facts and issues.

ARGUMENT

1. APPELLEE, DAVID BINGHAM, WHO ALLEGEDLY SUSTAINED A WORK RELATED INJURY ON FEBRUARY 4, 1974 HAS NOT MET HIS BURDEN OF ESTABLISHING EVIDENCE OF SUCH WORK RELATED INJURY SUFFICIENTLY STRONG TO COMPEL A FINDING FOR THE EM-

PLOYEE OR SO PERSUASIVE THAT IT WOULD BE CLEARLY UNREASONABLE FOR THE BOARD NOT TO BE PERSUADED BY IT.

Royal Crown Bottling Company v Bedwell, Ky., 449 SW 2d 767 sets out the ground rules for the issues in this case when it states very clearly:

As the Board found against appellee who had the burden of proof and the risk of not persuading the Board in his favor the only issue before the circuit court was whether appellee's proof was so strong as to compel a finding in his favor or, stated in another way, so persuasive it was clearly unreasonable for the Board not to be convinced by it. *McDowell Memorial Hospital v McCoy*, Ky., 407 SW 2d 717 (1966).

In this instant case the Board simply followed the medical findings of the claimant's own doctor in dismissing the claim (Board opinion, Workmen's Compensation Board record):

1. As fact finders, we must resolve the issue in this case as to whether plaintiff sustained a work related harmful change to his organism. Plaintiff claims to have been injured on February 4, 1974. His treating physician, Dr. Mary L. Wiss, has testified, p. 3, Q and A 12, as follows:

"He did. In his initial physical examination I could not find too much wrong except he seemed to have a little bit flabby back musculature and an increased lower curvature of the lumbar spine. I referred him to Dr. William Roland of Ashland

for consultation and we have Dr. Roland's report. I saw him again January 15 and he claimed that he had a spell of pain in his left leg followed by weakness in his right leg after something happening the night before. He said it started with all the tremendous number of steps. I saw him on February 28 when he said he had constant pain since his last visit. Incidentally he never looks like he is having so much pain. On April 9 he came in saying he was about the same and that he could not lift anything and that he had a continuous aching pain in his lumbar spine with any twisting or lifting. He had periodic spells of sciatic pain, that is pain along the back of the leg. I saw him again today and I can't find anything. His only treatment so far had been supporters.

2. We are constrained to hold that plaintiff's injury was not work connected.

Clearly from the testimony, *supra*, claimant failed to sustain a work connected injury or a harmful change to the organism, KRS 342.620(4) and the Board so found. See *Calvert v Brown and Williamson Tobacco Company et al*, Ky., 465 SW 2d 75:

The Board, in the proper exercise of its prerogative as the fact finder, was not persuaded to the view urged by the appellant. The evidence in her behalf was not so strong as to require a pleading in her favor. In such circumstances, the finding of the board is not to be upset on judicial review. KRS 342.285. *Royal Crown Bottling Company v Bedwell*, Ky. 449 SW 2d 767.

See also *Hunter v Great Lakes Construction Company*, Ky., 467 SW 2d 764:

The Board was not persuaded that appellant had sustained total and permanent disability. We find that the evidence of total and permanent disability as presented by the appellant is not so strong as to require the Board to be persuaded by it.

2. THE PIKE CIRCUIT COURT COMMITTED A REVERSIBLE ERROR OF LAW IN REVERSING THE FINDING OF FACT OF THE WORKMEN'S COMPENSATION BOARD WHEN THEIR OPINION AND ORDER WAS FULLY SUSTAINED BY THE EVIDENCE OF RECORD AND THE RULING CASE LAW IN KENTUCKY.

KRS 342.285 states:

The Court shall not substitute its judgment for that of the Board as to the weight of evidence on questions of fact . . .

This Court in a long series of opinions has consistently held that while the Circuit Court's findings of fact and conclusions of law may differ from that of the Board it may never substitute its judgment for that of the Board on findings of fact when the findings are substantiated by evidence of record. See *E. I. Dupont de Nemours & Company v Burns*, Ky., 427 SW 2d 58:

. . . all of which recognize the well established rule that the Workmen's Compensation Board is the sole fact finder in compensation proceedings and that the Court may not substitute its opinion for that of the Board on the weight of evidence. Factual find-

ings by the Board based upon substantive evidence of probative value are conclusive and binding on the Court . . . We agree that there was evidence in behalf of the present appellee which would have warranted the Board's finding in his behalf, but we do not find that the evidence in behalf of appellee was so overwhelming and persuasive that the Board could not justifiably find against him. It follows that the Circuit Court erred in setting aside the finding of the Board in light of the conflicting evidence in the record.

See also *Pittsburg and Midway Coal Mining Company v Rushing*, Ky., 456 SW 2d 816; and *Armco Steel Corporation v Mullins*, Ky., 501 SW 2d 261:

The board is the sole fact finder in compensation proceedings and the circuit court may not substitute its opinion for that of the board on the weight of the evidence. Factual findings by the board, based upon substantial evidence, are conclusive and binding on the court . . .

CONCLUSION

The opinion and award of the Workmen's Compensation Board of August 25, 1975 dismissing the claim for compensation benefits should be affirmed. The judgment of the Pike Circuit Court entered December 3, 1975 should be reversed and this matter remanded to the Board with orders to dismiss the claim.

Respectfully submitted,

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